State Of Michigan
In the Supreme Court

In the matter of:

Estate of Robert D. Mardigian, Deceased (a.k.a. Robert Douglas Mardigian, deceased)

Mark S. Papazian,
Petitioner-Appellee,
v.

Melissa Goldberg,
Respondent-Appellant, and

Susan V. Lucken and Nancy Varbedian,
Respondents-Appellants, and

Edward Mardigian, Grant Mardigian and Matthew Mardigian,
Respondents-Appellants.

Case No. 152655

COA Case No. 319023

Charlevoix County Probate Ct
Case No: 12-011738-DE
Case No. 12-011765-TV
Hon. Frederick R. Mulhauser

PETITIONER-APPELLEE MARK S. PAPAZIAN'S SUPPLEMENTAL MOAA BRIEF

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JUDGMENT APPEALED FROM

On November 11, 2013, the Charlevoix County Probate Court entered an Order granting summary disposition against Petitioner-Appellee Mark S. Papazian. On October 8, 2015, the Court of Appeals reversed the Probate Court's Order, in a published decision. *In re Mardigian Estate*, 312 Mich App 553; 879 NW2d 313 (2015).

On November 12, 2015, the Respondents-Appellants jointly filed an Application For Leave to Appeal from the Michigan Court of Appeals' October 8, 2015 Order.

On June 29, 2016, this Court issued an MOAA Order, requesting the filing of Supplemental Briefs on the issue of whether this Court should overrule *In Re Powers Estate,* 375 Mich 150 (1965).

STATEMENT OF
MOAA QUESTION PRESENTED FOR REVIEW

SHOULD THIS COURT AFFIRM *IN RE POWERS ESTATE*, 375 Mich 150 (1965) WHERE:

1. ***Powers* was correctly decided,** because it recognized:

   a. the importance of honoring the testator's intent; and

   b. that there was (and is) no statute invalidating estate documents that provide a substantial bequest to a scrivener who is unrelated to the decedent; and

   c. that when the rebuttable presumption of undue influence (which arises when a fiduciary benefits from a testamentary transfer) is rebutted, the resulting disposition actually reflects the testator's intent; and

   d. that the proper forum in which to test unprofessional conduct is the State Bar grievance procedure, not a jury trial determining the validity or invalidity of estate documents; and

2. ***Powers* is premised on a framework that continues to be practical and workable**, in that it is a delicate balancing of the conflicting laws and sources of public policies; and

3. ***Powers* has become so embedded in society's expectations that to change it would produce real-world dislocations,** in that it would override the testator's intent; dislodge the predictability of Michigan's statutory framework for validity of wills and trusts; cause unknown consequences on the presumption of undue influence by a fiduciary; and impinge on the role of the Attorney Grievance Commission by allowing a single judge to decide whether an attorney violated ethical standards, without regard to safeguards and proportionality interests; and

4. **Contrary to the Appellants' arguments, no change in the law alters the correctness of *Powers*,** because:

   a. honoring the testator's intent is still fundamental;

   b. changing the requirements for the validity of testamentary instruments is a legislative function, not a judicial one;

   c. the MRPCs (adopted in 1988) prohibit *drafting* an instrument but nothing in them prohibits *enforcing* an instrument drafted in violation of the rules;

   d. the MRPCs are not intended to be used in litigation to augment the consequences of violating a prohibition; and

   e. the "public policy" reflected in MRPC 1.8(c) cannot be used to impose an exception onto current probate statutes addressing validity of testamentary instruments because doing so would conflict with other important laws and policies?

Petitioner-Appellee Mark Papazian says: **YES, Affirm *Powers***

Respondents-Appellants jointly say: **NO, Overrule *Powers***

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INTRODUCTION

This Court has requested MOAA Supplemental Briefs on whether it should overrule *In re Powers,* 375 Mich 150; 134 NW2d 148 (1965). Petitioner-Appellee Mark Papazian respectfully responds that *Powers* should NOT be overruled. It was correctly decided and is firmly rooted on the importance of honoring the testator's intent.

Powers appropriately recognized that a will and trust are not necessarily rendered invalid because they were drafted by an attorney in violation of the attorney's ethical obligations. For more than 50 years, *Powers* has stood for the proposition that:

> The forum in which to test unprofessional conduct of an attorney in this State is adequately supplied in the State Bar grievance procedure. The forum in which not to test it is a jury trial determining testamentary capacity and undue influence. [*Powers*, 375 Mich at 178].

According to *Powers*, in a contest over the validity of a will or trust, "[w]hether proponent used questionable professional judgment in drawing the instrument involved . . . is irrelevant [to validity]." *Powers*, 375 Mich at 176.

What ***is*** relevant to the validity of estate documents, is whether an attorney unduly influenced her client to make a gift to the attorney. *Powers* reaffirmed Michigan's long-standing rebuttable presumption of undue influence when a fiduciary benefits from such a transaction.[1] This presumption shifts the burden of proof to the attorney to show that she

[1] See, e g, *Donovan v Bromley,* 113 Mich 53, 54; 71 NW 523 (1897) (devise to decedent's attorney raised presumption of undue influence); *In re Hartlerode's Estate,* 183 Mich 51, 60; 148 NW 774 (1914) (identifying "certain cases in which the law indulges in the presumption that undue influence has been used" including where client makes a will in favor of his lawyer); *Habersack v Rabaut,* 93 Mich App 300, 306, n 2; 287 NW2d 213 (1979) (presumption of undue influence where client makes will in favor of his lawyer).

did not unduly influence the decedent to make the gift, and that the estate documents are valid. Under this test, the validity of the estate documents is determined by whether the scrivener unduly influenced the testator. Where there is undue influence, the estate documents are invalid. Where there is no undue influence, the estate documents are valid and express the testator's intent for the disposition of his property.

The Respondents-Appellants urge this Court to overrule *Powers*, contending that it is not supportable after this Court's adoption of Michigan Rule of Professional Conduct ("MRPC") 1.8(c), which prohibits an attorney from drafting an instrument containing a substantial gift to a lawyer who is unrelated to the decedent. Appellants' focus on the MRPC ethical standards causes them to reach a wholly unsupportable result. This case raises issues that broadly affect many areas of law and policy in addition to attorney ethics. When ***all*** of the relevant factors are examined, there is no defensible basis to overrule *Powers*.

When this Court is asked to consider overruling a case, it must begin with a presumption against doing so; "*stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *2000 Baum Family Trust v Babel*, 488 Mich 136, 172; 793 NW2d 633 (2010), quoting *Payne v Tenn,* 501 US 808, 827; 111 S Ct 2597; 115 L Ed2d 720 (1991). Where, as here, the precedent under examination directly affects property rights, "the values served by stare decisis—stability, predictability, and continuity" are even more important than in other cases. *Baum Trust,* 488 Mich at 172. "[S]tare decisis is to be *strictly*

observed[2] where past decisions establish 'rules of property' that induce extensive reliance." *Id*, quoting *Bott v Natural Resources Comm*, 415 Mich 45, 77-78; 327 NW2d 838 (1982).

When asked to consider overruling precedent, this Court examines four questions. See *Hamed v Wayne County*, 490 Mich 1, 25; 803 NW2d 237 (2011). The first question is whether the decision at issue was wrongly decided. *Hamed*, 490 Mich at 25, citing *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). The Court should then examine: (2) whether the decision defies "practical workability," (3) whether the "reliance interests" reflected in that decision would work an undue hardship, and (4) whether changes in the law or facts since issuance of the decision no longer justify its holding. See *People v McKinley*, 496 Mich 410, 422; 852 NW2d 770 (2014), citing *Robinson*, 462 Mich 439, 464; 613 NW2d 307 (2000).

Powers was correctly decided. It squarely acknowledged that the challenged attorney conduct was ethically deficient, but nonetheless focused on the validity of the estate documents. *Powers* reiterated and reaffirmed the rebuttable presumption of undue influence by a fiduciary but declined to trench on the legislature's role in promulgating the standards for valid estate documents. *Powers* thus represents a practical and workable solution by establishing a delicate balance among conflicting policies that touch property laws in the probate context. *Powers* also protects the uniformity, predictability and

[2] Emphasis is added throughout this brief, unless otherwise indicated.

consistency necessary in the probate arena by honoring and enforcing the testator's expressed intent and by refusing to insert uncertainty into the statutory scheme.

The Appellants essentially begin and end their analysis with the 1988 adoption of MRPC 1.8(c). However, Rule 1.8(c) addresses (and prohibits) ***drafting*** an instrument; it does not address the ***validity*** of any instrument drafted in violation of the rules, nor does it void any gift contained in the instrument. The MRPCs are intended to establish the standards for ethical behavior of Michigan attorneys; they are not intended to dictate what happens when an attorney's behavior deviates from the standards. See, e.g., MRPC 1.0(b) ("The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule.")

Using the MRPCs and the public policy they represent to create a judicial exception to the statutory requisites for testamentary document validity would elevate the ethical rules above all conflicting sources of law and policy. The Appellants' myopic approach would invite this Court to: (1) ignore the intent of the testator; (2) usurp the role of legislators to decide what makes estate documents valid and invalid; (3) create new and unanticipated holes in Michigan's estates and protected individuals code ("EPIC");[3] and (4) create a *de facto* bypass of the attorney disciplinary system by permitting judges to *sua sponte* discipline lawyers without providing due process. "Before this court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it." *People*

[3] MCL 700.1101 et seq.

v Tanner, 496 Mich 199, 250; 853 NW2d 653 (2014), quoting *People v Graves,* 458 Mich 476, 480–481; 581 NW2d 229 (1998). Even if *Powers* were incorrectly decided (it is not), overruling it would create more injury and uncertainty, not less.

At bottom, the Appellants want this Court to adopt a bright line rule barring an attorney-scrivener from ***receiving*** a gift from an unrelated decedent even when there is no evidence of undue influence and therefore the decedent actually intended to benefit the attorney. Such a change in EPIC's statutory requirements should not be made by this Court.[4] Michigan's legislators, not its judges, are the appropriate individuals to decide whether to amend EPIC.[5]

This Court should decline to overrule *Powers* and should deny the Appellants' application for leave.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. Who's Who?

A. Bobby Mardigian (The Decedent)

[4] Although this Court has the power to regulate the State Bar, it does not have the power to dictate to the legislature what makes a Will or a Trust valid. See *People v Glass*, 464 Mich 266, 281; 627 NW2d 261 (2001), quoting *McDougall v Schanz,* 461 Mich 15, 26; 597 NW2d 148 (1999) ("[T]his Court's constitutional rulemaking authority extends only to matters of practice and procedure: *[t]his Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law*.")

[5] As will be discussed further, *infra,* in late 2015 the Probate & Estate Planning Section of the State Bar of Michigan established a committee to draft proposed legislation to amend EPIC by adding a forfeiture provision to invalidate a testamentary gift made to a Michigan attorney-scrivener. See Ex 1, December 19, 2015 Minutes of the Meeting of the Council of the Probate & Estate Planning Section, p 4; Ex 2, p 6 (identifying the four members of this ad hoc drafting committee).

Robert Douglas Mardigian ("Bobby") died on January 12, 2012 at age 59, following a short fight with aggressive lung cancer. Throughout his life, Bobby worked only sporadically; he lived primarily on money received from others.[6] Bobby's wealthy mother gave him money until she passed away in 2010.[7] Bobby and his brother each received half of their mother's sizeable estate.[8] When Bobby then died in 2012, he left an estate valued at $17 million dollars, which is the subject of this lawsuit.

B. Mark Papazian (The Petitioner-Appellee)

Petitioner-Appellee Mark Papazian and Bobby first met when they were 18 and 24.[9] Sharing a common Armenian heritage, Mr. Papazian considered Bobby "like family" and Bobby often referred to Mr. Papazian as his "cousin,"[10] although there was no blood relationship between the men. Even Bobby's brother, Edward, admitted that Mr. Papazian and Bobby were close friends "for many decades."[11]

C. Edward Mardigian and His Sons (Respondents-Appellants)

Respondent-Appellant Edward Mardigian is Bobby's older brother. Edward has two sons; the three of them together contested the validity of Bobby's Will and Trust filed

[6] Ex 3, Papazian Dep, 295:13–296:2.

[7] Ex 3, Papazian Dep, 296:2-13.

[8] Ex 4, E. Mardigian Dep, 95:24-96:1.

[9] Ex 3, Papazian Dep, 102:7-9.

[10] Ex 3, Papazian Dep, 51:22; 48:4-10. See also Ex 5, Bonventre Dep, 35:7-17; 66:1-5.

[11] Ex 4, E. Mardigan Dep, 44:19-21.

by Mr. Papazian, claiming among other things, that Mr. Papazian unduly influenced Bobby.[12] The relationship between Edward and Bobby was beyond strained: Edward testified that Bobby was a "non-productive human being"[13] who drank, gambled, did drugs, and tended to exaggerate.[14]

D. The Decedent's Nieces (Respondents-Appellants)

Edward and Bobby Mardigian had a sister who died prior to Bobby; she left three daughters who are Bobby's nieces.[15] Bobby characterized his relationship with his nieces as "unpleasant" – he felt they were greedy and had been inattentive to their grandmother (Bobby's mother) during her final years.[16] Two of the nieces (Susan Lucken and Nancy Varbedian; "the nieces") also jointly contested the validity of Bobby's Will and Trust.

E. The Girlfriend (Respondent-Appellant)

At the time of his death, Bobby was divorced.[17] His sporadic girlfriend, Melissa Goldberg, also contested Bobby's estate documents.

II. Bobby's Estate Plan Through The Years

A. Before 2007 (Prior To Any Involvement By Mr. Papazian)

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[12] Ex 4, E. Mardigian Dep, 43:15-19.

[13] Ex 4, E. Mardigian Dep, 89:16-19; 90:1-2.

[14] Ex 4, E. Mardigian Dep, 29:5-10.

[15] Ex 4, E. Mardigian Dep, 94:11-13; 24-25.

[16] Ex 6, Ryburn Dep, 130:7-17; 131:4-13; 132:3-6; 9-10; 135:18-25. Melissa Goldberg Ryburn was Bobby's girlfriend. [Ex 6, Ryburn Dep, 62:9-63:12]. She is now known as Melissa Goldberg.

[17] Ex 7, Robert Mardigian Death Certificate.

Bobby created, and changed, his estate plan several times. In his early estate plans (drafted in the early 1990's) Bobby included testamentary gifts to his family members. However, as rifts between him and his family grew, Bobby disinherited his family members. In fact, none of Bobby's estate plan documents drafted after 1995 included gifts to his brother Edward, or to Bobby's nieces.[18]

In 2003, Bobby's estate plan left the bulk of his estate to a friend (Dr. Raft) and to Raft's daughter.[19] In 2004, Bobby's estate plan contained provisions leaving $5 million each to two children of a different friend (Mr. Pertnoy), with the balance of Bobby's estate at that time going to Mr. Pertnoy.[20]

B. Mr. Papazian's Involvement With Bobby's Estate Plan

In 2007, Bobby contacted his good friend Mr. Papazian (a Troy, Michigan divorce lawyer) to update his estate documents; Mr. Papazian told Bobby to go back to a previous estate lawyer.[21] Bobby refused, claiming that Mr. Papazian was his lawyer and his "best friend."[22] Mr. Papazian eventually made the changes that Bobby wanted, and under the terms of the 2007 estate documents, Mr. Papazian's two children (instead of Mr. Pertnoy's

[18] Exs 8, 9, 10, 11, 12. (selected portions)

[19] Ex 8, pp 6-8; Ex 3, Papazian Dep, 136:20-22.

[20] Ex 10, pp 5-10; Ex 3, Papazian Dep, 136:22-25.

[21] Ex 3, Papazian Dep, 123:8–124:19.

[22] Ex 3, Papazian Dep, 124:15-19.

two children) became the beneficiaries, and Mr. Papazian (instead of Mr. Pertnoy) became the residual beneficiary of Bobby's estate.[23]

In 2010, Bobby again wanted to make changes to his estate plan by: (1) adding his girlfriend as a beneficiary, (2) modifying his canine trust, and (3) deleting some charitable bequests.[24] Mr. Papazian made these modifications and Bobby signed the amendments to his Trust on August 13, 2010.[25]

In early 2011, Bobby again pressed Mr. Papazian to make changes—this time to his Will. On May 16, 2011, Mr. Papazian sent the following e-mail message to Bobby:

> You need to tell me WHO gets all of your tangible personal property, household furniture and furnishings, appliances, automobiles boats, books, picture, jewelry, art objects, hobby equipment, and collections, wearing apparel, country club memberships and any other articles of household personal use. NOTE: YOU CAN DECIDE WHO GETS WHAT.[26]

An hour later, Mr. Papazian received a responsive e-mail from Bobby reiterating that he wanted Mr. Papazian to act as his personal representative, and for his personal property to go to Mr. Papazian.[27] After making the changes requested, on June 8, 2011, Bobby executed the Will, which devised the residue of his estate to the Trust in effect on the date of his death.[28]

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[23] Ex 3, Papazian Dep, 134:8-21; 148:3-10.

[24] Ex 3, Papazian Dep, 162:2-13; 166:14-19.

[25] Ex 3, Papazian Dep, 160:13-17.

[26] Ex 13, email.

[27] Ex 13, email.

[28] Ex 3, Papazian Dep, 203:13-20; 211:23—212:7.

The estate documents at issue here are Bobby's June 8, 2011 Will[29] and his August 13, 2010 Trust;[30] Mr. Papazian drafted portions of each of them.

III. Other Professionals Assisted Bobby with his Estate Planning After Mr. Papazian Participated in Drafting Bobby's Estate Documents

A. Bobby Reviewed His Estate Documents With An Independent Lawyer And Discussed Making Changes To The Documents Which Mr. Papazian Had Assisted In Drafting

Within weeks after Mr. Papazian completed work on Bobby's Will in June, 2011, Bobby contacted another attorney (Joseph Bonventre, of Clark Hill) and sent him copies of his Will and Trust for review.[31] Mr. Bonventre testified in deposition that, early in his conversations with Bobby, Bobby discussed the possibility of reducing the amount of his gifts to Mr. Papazian and his children.[32] Later, when Mr. Bonventre learned that Bobby's friend Mr. Papazian had been involved in drafting the estate documents, Mr. Bonventre raised with Bobby the possibility of a conflict of interest, but Bobby did not want Mr. Bonventre to spend time researching or pursuing that issue.[33] Bobby also was adamant that he did not want Mr. Bonventre contacting Mr. Papazian directly to discuss updating any of the estate documents.[34]

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[29] Ex 14.

[30] Ex 12 (selected portions).

[31] Ex 5, Bonventre Dep, 18:1-9; 21:13-15; 22:1-10.

[32] Ex 5, Bonventre Dep, 29:2–30:7.

[33] Ex 5, Bonventre Dep, 31:2-18; 130:1-11; 131:12-132:1.

[34] Ex 5, Bonventre Dep, 57:3-19.

Mr. Bonventre testified about a voicemail message that Bobby left for him on December 1, 2011:

> [Bobby] was basically saying that if he didn't do anything the way things are written now is fine, and to me that meant his current documents that he had already signed were fine, that's the way I took it, because that's why I continued to harp in those last days in December and January, things -- you know, do you want these distributions to be made that were set forth in your current documents? If not, you better change them now because you could die soon.[35]

Despite the fact that Bobby retained Mr. Bonventre to examine his estate documents, Bobby never signed any new estate documents altering either the Will or Trust previously drafted by Mr. Papazian and executed by Bobby.

B. Bobby Also Reviewed His Estate Plan With Two Independent Financial Advisors at Comerica, And Made No Changes To It

Comerica Bank managed Bobby's finances for several years prior to his death.[36] Four months ***after*** Mr. Papazian completed work on Bobby's estate documents, during the time that Bobby was discussing his estate plan with Mr. Bonventre, Bobby also met with two Comerica employees: (1) a Trust and Estate Advisor (an attorney); and (2) a Wealth Planner to discuss his estate plan.

On October 17, 2011, these two Comerica employees emailed a 76-page "wealth plan" for Bobby to Mr. Bonventre.[37] This "wealth plan" contained detailed discussion and

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[35] Ex 5, Bonventre Dep, 91:2-5; 92:17–93:1.

[36] Ex 15, [Comerica Trust and Estate advisor and attorney] K. Christ Dep, 143:2-13.

[37] Ex 16, Comerica October 17, 2011 "wealth plan" prepared for Bobby Mardigian (excerpts).

a diagram showing that, if Bobby died in 2011, Mr. Papazian would receive in excess of seven million dollars, and that both of Mr. Papazian's children would receive net bequests of $5 million.[38] No changes to the estate documents resulted from Bobby's review of this Wealth Plan.

IV. Bobby Died on January 12, 2012

On January 9, 2012 (more than six months after Mr. Papazian completed any involvement with Bobby's estate documents), Mr. Bonventre sent an email to the Comerica Trust and Estate Advisor stating that "based on my last call with Bob, he did not want to change anything until he thought about the issues further."[39]

Bobby died three days later, on January 12, 2012. Bobby had decided not to sign any of the documents that Mr. Bonventre prepared which would have amended Bobby's estate documents.[40]

V. Probate Court Proceedings

Almost immediately after Mr. Papazian filed Bobby's June 8, 2011 Will and Bobby's Trust for probate in the Charlevoix County Probate Court, Bobby's estranged family members (and one of Bobby's girlfriends) filed objections challenging both: (1) the estate documents, and (2) Mr. Papazian serving as personal representative. Each

[38] Ex 16, Comerica October 17, 2011 "Wealth Plan" p 52.

[39] Ex 5, Bonventre Dep, 108:3-7.

[40] Ex 5, Bonventre Dep, 109:1-7.

Respondent alleged that Bobby's estate documents were the product of undue influence exercised by Mr. Papazian over Bobby.[41]

On August 19, 2013, following discovery, the Mardigian Appellants moved for MCR 2.116(C)(10) summary disposition, asking the Probate Court to "void any claim" ***by Mr. Papazian and his children*** under the Will and Trust,[42] because he violated MRPC 1.8(c), and because enforcing the resultant estate documents would violate Michigan's public policy.

On September 11, 2013, Mr. Papazian filed a cross-motion for partial summary disposition on his claim that he had ***not*** unduly influenced Bobby, relying on admissions made by the Appellants. For example, Bobby's brother Edward candidly admitted at deposition that he had no evidence to support his claim that Mr. Papazian unduly influenced Bobby:

> Q. Did your brother ever tell you that he felt he was being influenced or dominated by Mark Papazian in terms of anything?

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[41] The three Mardigian Appellants filed Objections, asserting that: "The Alleged Last Will was the result of the fraud and *undue influence of Robert's attorney, Mark S. Papazian*." [Mardigian Mar. 5, 2012 Petition for Appointment of Special Fiduciary, p 6]. The Appellant nieces claimed that: "Papazian as drafting attorney, naming himself and his wife as a fiduciary of the estate, and naming himself as a beneficiary under the Previously Executed Will, compromises his honesty and integrity and creates the presumption of *undue influence and overreaching by Papazian*. . . ." (Emphasis added). [Nieces' March 26, 2012 "Amended Petition to Admit", p 10.] Appellant Melissa Goldberg [Ryburn], also filed objections.

[42] The Appellants did not ask the probate court to declare the estate documents ***void ab initio***—they asked only that ***portions*** of the documents benefitting Mr. Papazian and his children be stricken, thereby allowing the Appellants to take under a residuary clause. This relief is inconsistent with the holdings of the cases on which they relied. See, e g, *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 58; 672 NW2d 884 (2003) ("We find that public policy voids the contract ab initio").

A. No.

Q. For that matter, did your brother ever tell you at any point in time that he thought that either his estate planning or any other aspect of his life was being dominated by anyone else?

A. No.

Q. Has anyone else ever told you that they believe Mark Papazian was dominating or influencing your brother?

A. No.

Q. Do you believe that Mr. Papazian ever threatened your brother in trying to get him to either change his estate plan or take any other action?

A. No.

Q. You understand Mr. Papazian has been a close friend of your brother's for many decades, correct?

A. Yes.

Q. *Ultimately, sir, do you believe or do you know whether Mr. Papazian advised your brother about any aspect of his estate planning?*

A. *I don't know.*

Q. *Do you know at any time whether Mr. Papazian ever asked your brother to leave him any asset or any amount of money?*

A. *I don't know that.*[43]

[43] Ex 4, E. Mardigian Dep, 44:3-45:4. Mr. Papazian also pointed to the nieces' responses to Requests to Admit and to Ms. Ryburn's statement that she had "insufficient information" to respond to whether Mr. Papazian had ever unduly influenced Bobby's decisions. See Papazian SD Motion, Exhibits 15 and 20.

Mr. Papazian also relied on the fact that Bobby had consulted both an independent attorney and two independent financial advisors after Mr. Papazian participated in drafting the documents, and still Bobby made no changes to his estate documents. Mr. Papazian thus argued that public policy was insufficient to support voiding Bobby's Will and Trust where the bequests in them reflected Bobby's testamentary intent, and where the MRPCs, Michigan case law, and Michigan statutes contain no bar to enforcing estate documents that result from violation of MRPC 1.8(c).

The Appellants put forth no evidence of undue influence, claiming instead that the provisions in the Will and Trust benefitting Mr. Papazian and his children were invalid.

The probate court conducted no examination of Mr. Papazian's evidence, and it declined to permit a jury to do so. Instead, on November 6, 2013, the court ruled from the bench that it would refuse to

> accept the Will and Trust prepared by the attorney that benefits himself and his family for the purposes of probate and eventual enforcement. * * * The court . . . makes that decision based on that being not permitted under the Rules of Professional Responsibility. And the Court would be disinclined to enforce such a document in the court of this state.[44]

VI. Mr. Papazian Appeals and The Mardigians File An Attorney Grievance

On November 11, 2013, the same day that the Probate Court's Order was entered, Mr. Papazian filed a claim of appeal as of right in the Michigan Court of Appeals on behalf

[44] Ex 17, Nov 6, 2013 TR, 43:6-16. That same day, the Appellants reached a contingent settlement among themselves (which did not include Mr. Papazian or his children). That settlement is "contingent" on this appeal being unsuccessful.

of himself and his children. Five days later (December 16, 2013) the Mardigians filed an attorney grievance against Mr. Papazian. That matter remains pending as of this date.

VII. The Court of Appeals' Reversal

On October 8, 2015, the Court of Appeals issued an Opinion reversing the probate court's grant of summary disposition against Mr. Papazian. That Court held that Mr. Papazian should be permitted to present his evidence to a jury so that it could determine whether his actions constituted undue influence over Bobby. The Court of Appeal's Opinion contains four essential points:

(a) *In re Powers Estate*, 375 Mich 150, 156, 176, 179 (1965) expressly holds that a will devising the bulk of the estate to an unrelated attorney and his family is not thereby rendered invalid.[45]

(b) Several cases decided after 1965 that refused to enforce *contracts* entered into by an attorney in violation of the MRPC are inapplicable to this dispute, because a *contract* is fundamentally different than a *will*, and different policy considerations apply to enforcement of a will.[46]

(c) Michigan's statutory scheme dictates what a contestant must establish to invalidate a will or trust on the basis of undue influence.[47]

(d) "The framework adopted by the legislature attempts both to honor the actual intent of the grantor while also protecting against abuse."[48] "[C]ase law and existing statutes afford [Mr. Papazian] the opportunity to attempt to prove by competent evidence that the presumption of undue influence should be set aside." *Id.*

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[45] Ex 18, COA Opinion, pp 3-4.

[46] Ex 18, COA Opinion, pp 4-7.

[47] Ex 18, COA Opinion, pp 7-8.

[48] Ex 18, COA Opinion, p 8.

Judge Servitto filed a dissenting Opinion.[49]

VIII. Proceedings In This Court

On November 12, 2015 all Respondents-Appellants filed a joint Application in this Court for leave to appeal. Mr. Papazian filed his Answer to the Application on December 9, 2015, asking this Court to deny leave.

On June 29, 2016, this Court issued an Order requesting MOAA Supplemental Briefs "addressing among other issues, whether this Court should overrule *In re Powers Estate*, 375 Mich 150 (1965)."

ARGUMENT

THIS COURT SHOULD NOT OVERRULE *IN RE POWERS,* 375 MICH 150; 134 NW2D 148 (1965)

I. Standard of Review: Stare Decisis

"[T]here is a presumption in favor of upholding precedent." *McCormick v Carrier,* 487 Mich 180, 211; 795 NW2d 517 (2010). "Stare decision is generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Robinson v Detroit*, 462 Mich 439, 463; 613

[49] Judge Servitto would affirm the dismissal on the grounds that the "Legislature delegated the determination of public policy regarding the activities of the State Bar of Michigan to the judiciary"; "conduct that violates the attorney discipline rules set forth in the rules of professional conduct violates public policy"; and thus once an attorney acts contrary to the public policy set forth in the MRPC, the resulting instruments (here a Will and a Trust) are "no longer subject to dispute concerning intent." Ex 18, COA Opinion, Dissent, pp 2-3.

NW2d 307 (2000), quoting *Hohn v United States,* 524 US 236, 251; 118 S Ct 1969; 141 l Ed2d 242 (1998).

In approaching a case such as this that is "within the realm of property law" however, "the values served by stare decisis—stability, predictability, and continuity—must be most certainly maintained." *2000 Baum Family Trust v Babel,* 488 Mich 136, 172; 793 NW2d 633 (2010). "[S]tare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance." *Id*, quoting *Bott v Natural Resources Comm*, 415 Mich 45, 77-78; 327 NW2d 838 (1982).

The presumption in favor of upholding precedent may be rebutted if there is a "special or compelling justification to overturn precedent." *McCormick v Carrier,* 487 Mich 180, 211; 795 NW2d 517 (2010). When considering whether to overrule precedent, this Court considers a multifactored test. *Hamed v Wayne County*, 490 Mich 1, 25; 803 NW2d 237 (2011). The first question is whether the decision was wrongly decided. *Hamed*, 490 Mich at 25, citing *Robinson,* 462 Mich at 464. Thereafter, the Court should examine: (2) whether the decision defies "practical workability," (3) whether the "reliance interests" would work an undue hardship, and (4) whether changes in the law or facts no longer justify the decision at issue. *People v McKinley*, 496 Mich 410, 422; 852 NW2d 770 (2014), citing *Robinson*, 462 Mich 439, 464; 613 NW2d 307 (2000). "Before this court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it." *People v Graves*, 458 Mich 476, 481; 581 N.W.2d 229 (1998), quoting *McEvoy v City of Sault Ste Marie*, 136 Mich 172, 178, 98 NW 1006 (1904).

II. The First Question: *In Re Powers,* 375 Mich 150 (1965) was correctly decided

A. The *Powers* decision

In re Powers Estate, 375 Mich 150; 134 NW 2d 148 (1965) was correctly decided.

As a threshold matter, note that when *Powers* was decided, Michigan plainly recognized that it was unethical for an attorney to draft a testamentary instrument making a devise in favor of the attorney. See, eg *Abrey v Duffield,* 149 Mich 248, 259; 112 NW 936 (1907) ("I believe it to be generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor, and this court has held that such dispositions are properly looked upon with suspicion."). See also *Powers,* 375 Mich at 181 (SOURIS, concurrence) (same).

Despite this fact, in *Powers*, the female decedent asked the attorney-husband of a close friend to draw her will; the resulting will left most of the decedent's considerable estate to the friend and her lawyer-husband, while disinheriting the decedent's relatives. *Powers,* 375 Mich at 156-157, 163. At the ensuing trial over the will's validity, the jury returned a general verdict against the will. This Court reversed and remanded for new trial.

Notwithstanding the *Powers* appellees' strenuous protestations on appeal about the impropriety of the attorney's actions, this Court made clear that the appropriate issue in determining the validity of the will was whether the attorney had unduly influenced the decedent, not whether the attorney had violated his professional ethical obligations. *Powers,* 375 Mich at 157-158. The Court directed that:

> The forum in which to test unprofessional conduct of an attorney in this State is adequately supplied in the State Bar grievance procedure. The forum in which <u>not</u> to test it is a jury trial determining testamentary capacity and undue influence. The purity of motive of the advocates representing those found to be proper parties in interest is not to be the subject of consideration. It is not in issue. [*Powers,* 375 Mich at 178]

The Court thus remanded the case for trial to determine, in relevant part, whether the lawyer unduly influenced the decedent. Obviously, if the *Powers* Court did not believe that there were any circumstances under which such a will could be valid, remand would not have been necessary.

B. *Powers* Is Consistent With The Way Michigan Has Determined The Validity Of Estate Documents For More Than One Hundred Years

For more than one hundred years, Michigan courts have consistently held that the proper focus ***in litigation over the validity*** of wills (and trusts) is whether there was undue influence by the attorney, not whether the attorney violated ethical standards or obligations. See, e g, *Donovan v Bromley,* 113 Mich 53, 55; 71 NW 523 (1897) ("It is also true that the presumption of undue influence arising from a will being drafted by a beneficiary, or by one in confidential relations, may be overcome by showing that it was executed freely, and under circumstances which rebut the inference of undue influence; and, where the proof of execution is such as to convince the jury that the testator was not at that time under the control of the legatee, it is certainly not error to at least permit the jury to draw the inference in favor of the validity of the will from the circumstances."); *In re Hartlerode's Estate,* 183 Mich 51, 60; 148 NW 774 (1914) (presumption that undue influence has been used where a client makes a will in favor of his lawyer and burden rests with the proponent of the instrument to overcome this presumption); *In re Powers,* 375 Mich 150, 176, 181; 134

NW2d 148 (1965) (whether attorney who drew estate document "used questionable judgment" is *irrelevant* to validity of will; and concurrence, noting the burden of overcoming a presumption of undue influence where beneficiary is lawyer-scrivener). See also *Habersack v Rabaut,* 93 Mich App 300, 306; 287 NW2d 213 (1979) (although the Court "look[ed] with disfavor upon the type of transactions engaged in by the defendant attorney," evidence of: (1) previous wills showing that decedent intended to disinherit her son, and (2) longstanding friendship between the lawyer and the decedent, was sufficient to rebut the presumption of undue influence).

"The presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction." *In re Estate of Karmey*, 468 Mich 68, 74; 658 NW2d 796 (2003), quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).

Once a challenger satisfies these three prongs, the burden of proof shifts to the attorney-fiduciary to attempt to rebut this presumption and prove that the bequest in his favor does not result from his exercise of undue influence over the testator. See *Vollbrecht's Estate v Pace,* 26 Mich App 430, 437; 182 NW2d 609 (1970) (once the jury finds substantial benefit to the fiduciaries, presumption of undue influence arises; whether this presumption is rebutted is a second question); *In re Barnhart Estate*, 127 Mich App 381, 388-389; 339 NW2d 28 (1983); *Detroit Bank & Trust Co v Grout*, 95 Mich App 253, 272; 289 NW2d 898 (1980).

C. *Powers* Recognizes That The Validity of Wills and Trusts Is Statutory and that Michigan's Legislature Has Chosen Not to Enact A Statute Voiding Gifts to an Attorney-Scrivener

Powers implicitly recognized that it was the task of the legislature, not the judiciary, to enact statutes governing the validity of wills and trusts. See *In re Blanchard's Estate*, 391 Mich 644, 664-65; 218 NW2d 37 (1974) (concurrence) (Michigan probate statutes "set[] forth certain definite requirements which must be complied with for a will to be valid. By setting forth these requirements, and by providing for revocation by law only under certain circumstances, our Legislature sought to achieve a certain stability in the probate area of the law.") See also *Matter of Estate of Jurek*, 170 Mich App 778, 784; 428 NW2d 774 (1988), citing *Labine v Vincent,* 401 US 532; 91 SCt 1017; 28 LEd2d 288 (1971).

The legislature in some states has enacted statutes that void testamentary gifts benefitting a non-family member scrivener attorney. See, for example, Vernon's Texas Estates Code Ann, § 254.003(a); Kan Stat Ann § 59-605. However, when *Powers* was decided, Michigan's legislature had ***not*** enacted such a forfeiture statute. See *Abrey v Duffield,* 149 Mich 248, 259; 112 NW 936 (1907) (noting absence of any statute invalidating a bequest made to a scrivener of a will).

The fact that, since *Powers* was decided, the Michigan legislature has continued *not* to enact a statute voiding such gifts is significant. If this Court were to judicially create

such a forfeiture provision, it would be doing so in disregard of (and in a manner inconsistent with) the express provisions of EPIC established by the Michigan legislature.[50]

III. The Second Question: The Approach In *Powers* Reflects a Practical and Workable Solution to Determining Validity of Estate Documents

The approach in *Powers* is a practical, workable and predictable solution to a complex problem. It recognizes first and foremost that the issue in a will contest is the validity of the estate documents.[51]

In examining the validity of the documents, *Powers* applies well-established standards. That is, where an attorney-scrivener drafts an estate document that contains a substantial benefit to himself, Michigan law raises a presumption of undue influence by a fiduciary. See *In re Estate of Karmey*, 468 Mich 68, 74; 658 NW2d 796 (2003). This shifts the burden of proof to the attorney-fiduciary to attempt to rebut this presumption and to thereby prove that the bequest does not result from his exercise of undue influence over the testator.[52] This imposes a heavy burden on the attorney-scrivener, but it does not preclude the possibility that an attorney could draft estate documents in his own favor in accordance with the testator's intent and in the absence of undue influence.

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[50] See *infra,* p 27, addressing the Michigan's Probate & Estate Planning Section's establishment of a committee to draft this kind of proposed legislation.

[51] Thus, the fact that the attorney showed "dismal professional judgment" by ignoring his ethical obligations is legally irrelevant to the validity of the estate document. *Powers*, 375 Mich at 157.

[52] See *In re Barnhart Estate*, 127 Mich App 381, 388-389; 339 NW2d 28 (1983); *Detroit Bank & Trust Co v Grout*, 95 Mich App 253, 272; 289 NW2d 898 (1980); *Vollbrecht's Estate v Pace,* 26 Mich App 430, 437; 182 NW2d 609 (1970).

To be sure, *Powers* did not approve of or excuse the conduct of the attorney-scrivener in that case. But the Court recognized that the proper "forum in which to test unprofessional conduct of an attorney in this State is adequately supplied in the State Bar grievance procedure." *Powers*, 375 Mich at 178. This statement is more significant than it may at first appear.

The attorney grievance procedures currently in place were established by this Court and provide important rights to attorneys against whom allegations of ethical misconduct are lodged. See eg MCR 9.101 et seq and MCR 9.126 (addressing confidential aspects of investigations and hearings). Maintaining this current system would preserve the rights of Michigan attorneys to have such allegations addressed and resolved pursuant to established procedures and not on an ad hoc basis by trial judges. This further serves to insure that any discipline actually imposed will be proportionate to: (1) the severity of the infraction, and (2) the discipline imposed on other attorneys who committed similar infraction(s).

The current system also serves to prevent abuse of power by trial judges. For example, MCR 9.105(A) makes clear that "[d]iscipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession." (Indeed, contrary to the result trumpeted by the Appellants, violation of an ethical rule does not always dictate that discipline be imposed.[53]) Yet if *Powers* were

[53] See *In the Matter of Robert H. Watson, Jr.* (File No. DP-209/82) (July 18, 1983), Ex 19, where a lawyer was charged with misconduct for drafting a will in which he was named as sole beneficiary and executor. Stated the Attorney Discipline Board: "While there is a rebuttable presumption of undue influence in cases where a lawyer drafts a will naming himself as beneficiary, we find that the record before us contains no evidence of undue influence and is sufficient to overcome such a presumption." The Board emphasized that there was no statute to

overruled and trial judges were permitted to make summary determinations of ethical misconduct by attorneys appearing before them, it would be easy to envision a judge imposing punitive discipline on an attorney (particularly in an election year, when reelection might be dependent in part on public perception of the judge's "toughness" on issues). In sum, the attorney grievance procedures protect important rights of Michigan attorneys and should not be cast aside in favor of a system that would permit trial judges to impose summary discipline.

The *Powers* approach is a practical and workable solution that neither impinges upon, nor ignores, other areas of law or policy.[54] It preserves the testator's intent (ie, where the scrivener can prove that there was no undue influence, the bequest necessarily reflects the testator's intent), it preserves the right of the legislature to enact or modify statutes affecting the validity of estate documents, and it preserves the rights of Michigan attorneys to have grievances handled through established procedures. This factor therefore favors declining to overrule *Powers.*

IV. The Third Question: The Reliance Interests Here Would Work an Undue Hardship

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invalidate a bequest to a scrivener and characterized *Karabatian* as not describing the conduct in question as prohibited, but rather as "suspicious." See also *Grievance Administrator v Doherty* (File No. DP 153/84) (September 30, 1986), Ex 20 (Board declined to discipline attorney who drafted wills for a client naming the attorney and his wife as beneficiaries). Both decisions were attached to Mr. Papazian's Sept 26, 2013 Opposition to the Mardigian SD motion below.

[54] Michigan's Constitution, art 3, §2 recognizes that the powers of government are divided into three branches, and that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." "[T]he evil to be avoided [by this separation of powers] is the accumulation in one branch of the powers belonging to another." *People v Conat*, 238 Mich App 134, 146; 605 NW2d 49 (1999).

The third question requires the Court to examine the effect that overruling *Powers* would have on the "reliance interests" of those who rely on *Powers* and the law set forth therein. "The Court must ask whether the previous decision has become so embedded, so accepted, so fundamental to everyone's expectations, that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson v Detroit*, 462 Mich 439, 466; 613 NW2d 307 (2000). That is, would overruling *Powers* disrupt "any real-world reliance interests"? See *Hamed v Wayne County*, 490 Mich 1, 27; 803 NW2d 237 (2011).[55]

The answer is yes; overruling *Powers* would cause real world disruptions. "A party should be able to know with certainty whether or not a will is valid." *In re Blanchard's Estate*, 391 Mich 644, 664-65; 218 NW2d 37 (1974) (concurrence). Although the legislature has made some significant revisions to Michigan's probate statutes, it has made no changes to the statutes that would change the result reached in *Powers* 51 years ago.[56]

If this Court were to overrule *Powers* and institute the kind of bright-line test that the Appellants seek here, this would usurp the right of the legislature to adopt any

[55] This question takes on added significance when addressing a decision that affects the disposition of property. "Judicial 'rules of property' create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital." *Bott v Natural Resources Comm*, 415 Mich 45, 77-78l 327 NW2d 838 (1982), quoted in *2000 Baum Family Trust v Babel*, 488 Mich 136, 172; 793 NW2d 633 (2010).

[56] "[W]hen discussing reliance interests in the context of statutory law, the words of a statute themselves are of paramount importance because 'it is the words of the statute itself that a citizen first looks for guidance in directing his actions.'" *People v Breidenbach*, 489 Mich 1, 17; 798 NW2d 738 (2011). See also *Hamed v Wayne County*, 490 Mich 1, 28; 803 NW2d 237 (2011) ("When the decision at issue involves statutory law, the best indicator of society's knowledge of the law, and what society reasonably relies on, is the language of the statute itself.").

amendments to EPIC that it deems appropriate, in light of the instant case or otherwise. On this point, this Court should be advised that in December 2015, an attorney for one of the Appellants in the instant case approached the State Bar of Michigan's Probate & Estate Planning Section to request that the Section draft an amicus brief addressing issues in this case.[57] All members of the Section council who were involved in any capacity in the instant case were recused from the ensuing discussions.[58] After lengthy debate among the remaining council members, there was no agreement about proceeding with an amicus brief and the request was withdrawn.[59]

The Section Chairperson did, however, request at that time that the Section's committee on legislation begin drafting "a legislative proposal for a statutory forfeiture of a gift in an estate planning document to the drafting attorney."[60] Since that time, the Probate & Estate Planning Section formed a four-member ad hoc drafting committee and tasked them with drafting a "proposal for forfeiture of gifts to lawyer who drafted the instrument."[61]

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[57] See Ex 1, December 19, 2015 Minutes of the Meeting of the Council of the Probate & Estate Planning Section of the State Bar of Michigan, p 4.

[58] See Ex 1, p 4.

[59] See Ex 1, p 4.

[60] Ex 1, p 4.

[61] See Ex 2, p 6. Note that these six pages are excerpts from a much larger document, which was located in its entirety at http://connect.michbar.org/probate/events/schedule.

Obviously, it is unknown whether the legislature will consider any proposed legislation that the Section's ad hoc committee generates. However, if this Court were to overrule *Powers* despite the actions of the Probate & Estate Planning Section's drafting committee, this would preclude the legislature from considering any draft legislation that the Section puts forward and it would also alter the predictability and certainty in EPIC's overall statutory scheme by imposing requirements for probate document validity other than those currently contained in EPIC.

Finally, this Court should not lose sight of the reliance interests of Michigan testators. In addition, "[a] fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible." *In re Kremlick Estate,* 417 Mich 237, 240; 331 NW2d 228 (1983). "[I]t is the duty of the courts to carry out as nearly as possible the intent of a testator or testatrix as to the distribution of an estate in so far as such intent has been expressed in the lawful provisions of a will." *In re Howlett's Estate,* 275 Mich 596, 600–601; 267 NW 743 (1936).

Overruling *Powers* would thus disrupt the reliance interests of: (1) residents of Michigan who desire to know with certainty and predictability that their probate documents are valid; (2) attorneys who practice probate law and rely on EPIC's provisions; and (3) Michigan legislators who are tasked with updating or amending EPIC.

V. The Fourth Question: Intervening Changes in the Law Do Not Require Overruling *Powers*

The final prong for examination is "whether intermediate changes in the law or facts no longer justify" the previous decision. *People v Breidenbach*, 489 Mich 1, 17; 798 NW2d

738 (2011). Appellants contend that the 1988 enactment of MRPC 1.8(c) is so significant that *Powers* should be overruled, EPIC and the common law addressing undue influence by a fiduciary should be ignored, and this Court should create a bright line rule barring any attorney from receiving a substantial gift under a will drafted in whole or in part by the attorney (unless the attorney is related to the decedent), even where the attorney can prove that there was no undue influence. This argument is flawed and must be rejected.

A. The MRPCs Do Not Authorize Striking A Gift To a Lawyer-Scrivener

MRPC 1.8(c) states that "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee." Appellants argue that where, as here, an action is ethically prohibited, courts must necessarily enforce the prohibition. This argument fails in light of the specific language of the MRPCs.

As a threshold matter, MRPC 1.8(c) does not prohibit an attorney from ***taking*** under an instrument that the attorney drafted—it prohibits ***drafting*** the instrument. The Appellants assume that these two actions are identical; they are not.[62] MRPC 1.8(c) does ***not*** contain any provision striking or voiding of any instrument or any resulting

[62] Would it be unethical for an attorney-father to ***take*** a gift under an instrument ***drafted by*** his attorney-son leaving the bulk of a client's estate to the father, who had acted as the decedent's lawyer for many years? Does it matter if the father did not know what the will provided? See *In re Bloch*, 425 Pa Super 300, 310 n 8; 625 A2d 57, 63 (1993) ("To the extent that the scrivener's conduct is challenged as unethical behavior violative of the Rules of Professional Conduct, Rule 1.8(c), our Supreme Court has held that enforcement of the Rules of Professional Conduct does not extend itself to allow courts to alter substantive law or to punish an attorney's misconduct.")

testamentary gift. Although Rule 1.8(c) prohibits certain conduct, it does not address the validity of any document resulting where the attorney does not comply with ethical rules. This omission cannot be ignored. The rules of statutory construction apply to the provisions of the MRPC,[63] and when interpreting statutes, courts are to assume that an omission in a text was intentional. *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 135; 662 NW2d 758 (2003).

On the other hand, MRPC 1.0(b) states that, "[f]ailure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. *The rules do not, however, give rise to a cause of action for enforcement of a rule* or for damages caused by failure to comply with an obligation or prohibition imposed by a rule." See also *Watts v Polaczyk*, 242 Mich App 600, 607 n 1; 619 NW2d 714 (2000) ("though failure to comply with the requirements of MRPC 1.8(h) may provide a basis for invoking the disciplinary process, such failure does not give rise to a cause of action for enforcement of the rule or for damages caused by failure to comply with the rule.")

Even more directly, the Preamble comments to Rule 1.0 provide that "nothing in the rules should be deemed to *augment . . . the* ***extradisciplinary consequences*** *of violating such a duty.*") *See also Johnson v QFD, Inc*, 292 Mich App 359, 365-366; 807 NW2d 719 (2011) (while "as a general matter . . . contracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void . . . it does not necessarily follow that every

[63] *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 44-45; 672 NW2d 884 (2003).

statutory or regulatory violation by one of the contracting parties renders the parties' contract void and unenforceable.").

Finally, the Michigan Court Rule provisions addressing attorney disciplinary proceedings contain ***no*** suggestion that attorney discipline may be imposed by a trial judge presiding over litigation about the validity of probate documents. In fact, MCR 9.107(A) provides that "[s]ubchapter 9.100 [of the MCRs] governs the procedure to discipline attorneys" and 9.107(B) prohibits a local bar association from conducting a separate proceeding to discipline an attorney. This strongly suggests that the sole method by which an attorney may be disciplined for ethical misconduct is in accordance with MCR 9.100 et seq, and not by a judge in a case in which the attorney appears.[64]

For each of these reasons, the Appellants' argument (that there has been a change to Michigan's law that requires overruling *Powers*) must be rejected.

B. The Fact That the MRPCs Prohibit Certain Conduct Cannot Be Used as a Basis To Create a "Public Policy" Exception to Michigan's Statutes Regarding Probate Document Validity

Despite the glaring absence of language in the MRPCs voiding an instrument (or a gift) drafted in violation of the rules, Appellants nonetheless urge this Court to overrule *Powers*. They argue that, because Rule 1.8(c) states that certain action "shall not" be done,

[64] A judge does, of course, have contempt power that may be used against lawyers (and litigants) to punish disobedience of the judge's orders. See MCL 600.1701 providing that a circuit court has the "power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases . . . (g) Parties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court."

courts are authorized to summarily *enforce* the Rules' prohibitions because the rules reflect Michigan public policy. Despite the superficial appeal of this argument, careful examination reveals how unworkable and dangerous this approach would be.

1. Courts in Other States Have Refused To Create Rule 1.8(c) "Public Policy" Exceptions

Michigan courts are not the first to face this argument: this precise issue has been examined in three out-of-state cases, each of which rejected the argument.

a. *Agee v Brown*, 73 So3d 882 (Fla App 2011)

In *Agee v Brown*, 73 So3d 882, 884 (Fla App 2011), the trial court (like the probate court here) found that a testamentary gift to a lawyer was void as contrary to public policy based on Florida's version of Rule 1.8(c) because the decedent's lawyer drafted a will that left a substantial bequest to the lawyer and his wife. On appeal, the appellee sought affirmance, arguing that "the bequest to a drafting attorney must be deemed void as contrary to public policy" and that "[p]ublic policy demands protection of the public and the instilling of confidence in the legal profession." *Agee*, 73 So3d at 886.

The *Agee* Court squarely rejected this argument, noting that the Florida Probate Code does not provide for an automatic exclusion of the bequest. *Agee*, 73 So3d at 885. "It is a well-established tenet of statutory construction that courts are not at liberty to add words to the statute that were not placed there by the Legislature." *Agee*, 73 So3d at 885. The Court further reasoned that the "best way to protect the public" from unethical drafting of wills "is entirely within the province of the Florida Legislature." *Agee*, 73 So3d at 886. Finally, the Court noted that Florida's statutory framework already contained protection

against abuse, including § 732.5165, Fla Stat (2009) (will is void if execution is procured by undue influence) and § 733.107(2), Fla Sta. (2009) ("The presumption of undue influence implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof...."). *Agee,* 73 So3d at 886.

b. *Sandford v Metcalfe,* 110 Conn App 162; 954 A2d 188 (2008)

Likewise, in *Sandford v Metcalfe,* 110 Conn App 162; 954 A2d 188 (2008), *cert denied*, 289 Conn 931 (2008), the Connecticut Court of Appeals rejected the same "public policy based on Rule 1.8(c)" argument. There, the decedent signed a handwritten will five days before her death leaving her estate to her lawyer (who had drafted it at the decedent's home) and her handyman; this will revoked a 38-year old will that would have benefited her heirs. The heirs challenged the new will, asserting undue influence and claiming that permitting the lawyer to take would violate public policy because the lawyer violated Rule 1.8(c).

On appeal the issue was "whether there should be a forfeiture of the bequest to Sandford, the attorney who drafted the will, on the basis of public policy." *Metcalfe,* 110 Conn App at 167. The court found that forfeiture was not authorized, holding that "[t]he law governing descent and distribution emanates from the legislature and is purely statutory. . . . [and there is] . . . no statute barring an attorney who drafted a testamentary instrument from inheriting by the instrument she drafted." *Metcalfe,* 110 Conn App at 168-169.

After finding no statutory basis to impose a forfeiture of the gift, the Court examined whether it could fashion an equitable remedy to reach the result urged by the heirs:

> Because there is no statute barring a distribution to Sanford, the heirs at law ask us to use our equitable powers to prevent such a distribution. We cannot do so. Even if the omission of such a statute were the result of legislative oversight or neglect, we have no power to supply the omission or to remedy the effect of the neglect. Any qualification [of the law of descent and distribution] pronounced by this court would be a judicial grafting of public policy restrictions on an explicit statutory provision. * * * The statutes cannot be changed by the court to make them conform to the court's conception of right and justice in a particular case. ***To avoid trenching on legislative ground, the court must take the view that if the legislature had intended such an exception from the statutes as is sought in this case, it would have said so.*** Although we agree that it is ill-advised, as a matter of public policy, for an attorney to draft a will in which she is to receive a bequest, in the absence of statutory provisions to the contrary, there is no bar against the right of Sandford to inherit from the decedent's estate under the statutes governing descent and distribution. ***If the law is to be changed to make provision for the situation at hand, it is for the legislature to make the change, not the court***. [*Metcalfe,* 110 Conn App at 169-170 (Citations and ellipses omitted)].

The court thus squarely declined the invitation to fill the legislative hole perceived by the will contestants.

c. *In re Bloch*, 425 Pa Super 300; 625 A2d 57, 63 (1993)

Finally, Pennsylvania's intermediate appellate court reached a similar result in *In re Bloch*, 425 Pa Super 300; 625 A2d 57, 63 (1993). There, the lawyer who drafted the will included substantial bequests to the lawyer's father (also a lawyer) and to the father's girlfriend. The contestants challenged the will on numerous grounds, including undue influence and the contestant's view that the will was drawn in violation of Rule 1.8(c) because it contained a substantial bequest to the scrivener's father. The Court spent little time addressing the ethical allegation, dismissing it in a footnote: "To the extent that the

scrivener's conduct is challenged as unethical behavior violative of the Rules of Professional Conduct, Rule 1.8(c), our Supreme Court has held that enforcement of the Rules of Professional Conduct does not extend itself to allow courts to alter substantive law or to punish an attorney's misconduct." *In re Bloch*, 425 Pa Super at 310 n 8.

Admittedly, these three cases are not binding on this Court. However, each of them examined the same issue presented here, and concluded that the validity of wills and trusts is governed by statute, that any forfeiture of a bequest to the lawyer-scrivener must come from the legislature, and therefore that any forfeiture imposed by the court based on a Rule 1.8(c) violation would be inconsistent with the statutory pronouncements in each state. For these same reasons, this Court should not overrule *Powers* and preempt EPIC's statutory scheme in Michigan by judicially creating a forfeiture provision based on Rule 1.8(c) or the public policy which supports it.

2. The Public Policy Reflected in MRPCs Must Be Balanced Against Other Inconsistent and Conflicting Sources of Michigan Public Policy

Because the Appellants rely so heavily on the public policy reflected in Rule 1.8(c), they give minimal consideration to the effect of *other* sources of public policy that are also binding on this Court.

First, Michigan courts are bound to follow the public policy pronouncements set forth in statutes adopted by the legislature. See, e.g., *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 131; 596 NW2d 208 (1999) ("Unquestionably, public policy pronouncements of the Michigan Legislature, enacted as statutes, are binding on this Court"); *Watts v Polaczyk*, 242 Mich App 600, 607; 619 NW2d 714 (2000) (same).

Here, EPIC, MCL 700.1101 et seq., including the provision granting individuals the right to prepare a will (MCL 700.2501), reflects legislative intent to grant Michiganders the right to leave their assets to whom they choose. See also MCL 700.1201(b), requiring the Code to be applied "to promote its underlying purposes and policies, which include . . . to discover and make effective a decedent's intent in the distribution of the decedent's property." Similarly, one of the purposes of the Michigan Trust Code is to "foster certainty in the law so that settlers or trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust." MCL 700.8201(2)(c).

It is therefore the public policy of Michigan, as recognized by the legislature, to effectuate a decedent's intent. See generally *In re Estate of Raymond*, 483 Mich 48, 58; 764 NW2d 1 (2009) (the "guiding polar star" is that the intent of the testator must govern), quoting *In re Churchill's Estate*, 230 Mich 148, 155; 203 NW 118 (1925). "A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible." *In re Kremlick Estate,* 417 Mich 237, 240; 331 NW2d 228 (1983). "[I]t is the duty of the courts to carry out as nearly as possible the intent of a testator or testatrix as to the distribution of an estate in so far as such intent has been expressed in the lawful provisions of a will." *In re Howlett's Estate,* 275 Mich 596, 600–601; 267 NW 743 (1936).[65]

[65] Contrary to the Appellants' argument, enforcement of Bobby's Will and Trust would not violate any public policy stated in EPIC. EPIC contains no provision that voids a will or trust which a judge believes was ***created*** in a manner that violates public policy. Rather, MCL 700.7410(1) permits termination of a trust only where the ***purpose*** of the trust is contrary to public policy. MCL 700.7404 permits a trust to be created where its ***purposes*** are not contrary to public policy.

The Appellants do not address the public policy permitting a testator to leave his property to whom he wants, or the public policy requiring courts to enforce legislatively adopted statutes. Instead, they rely on cases in which courts refused to enforce attorney fee *contracts* entered into between an attorney who violated one of the MRPCs (on one hand) and a client or another attorney (on the other hand).[66] Each of these cases involved only the contractual expectations of the lawyer and the other party to the contract. *There were no countervailing public policies* (such as the obligation to uphold the testator's intent): the court was free to simply decline enforcement of the contracts without having to weigh conflicting sources of public policy. In contrast, here there are two independent countervailing public policies that must be balanced against the public policy reflected in MRPC 1.8(c): (1) the right of a decedent to leave property to whomever she pleases, and (2) the court's obligation to enforce the probate statutes of Michigan.

To be crystal clear, there is nothing "unlawful" about Bobby's intent to leave most of his assets to his best friend and to disinherit his family. Leaving money to a friend is not an unlawful ***purpose*****,** such as creating a "playfield for white children" (*purpose* at issue in *La Fond v City of Detroit,* 357 Mich 362, 366; 98 NW2d 530 (1948)), or attempting to perpetuate individuals in office to the detriment of minority stockholders (*purpose* at issue in *Billings v Marshall Furnace Co*, 210 Mich 1, 5; 177 NW 22 (1920)). Here, the Appellants object to *who drafted* the estate documents—not to the lawfulness of the purpose. EPIC does not support their argument.

[66] See *Evans & Luptak, PC v Lizza,* 251 Mich App 187; 650 NW2d 364 (2002) (refusing to enforce agreement for referral fee from replacement counsel, after plaintiffs-attorneys withdrew due to conflict of interest); *Abrams v Susan Feldstein, PC,* 456 Mich 867; 569 NW2d 160 (1997) (remanding to address fee-splitting contract between two attorneys); *Morris & Doherty, PC v Lockwood,* 259 Mich App 38; 672 NW2d 884 (2003) (refusing to enforce referral fee contract between lawyer and inactive member of Bar); *Speicher v Columbia Twp Bd of Election Commissioners,* 299 Mich App 86, 92; 832 NW2d 392 (2012) (refusing to enforce contract for attorney fees that were grossly excessive).

On this point, the Court of Appeals' Opinion flagged an important distinction between the instant case and the Appellants' four cases: the public policy considerations supporting enforcement of a *contract* differ from the public policy considerations supporting enforcement of a *will*. Ex 18, Opinion, pp 4-7. "Whereas a contract is 'an agreement between parties for the doing or not doing of some particular thing and derives its binding force from the meeting of the minds of the parties,' a will is 'a unilateral disposition of property acquiring binding force only at the death of the testator and then from the fact that it is his or her last expressed purpose, and a will, although absolute and unconditional, cannot be termed a contract." Ex 18, Opinion, p 5 (citations omitted). Therefore, according to the court of appeals:

> . . . there are valid policy reasons why our Supreme Court could reembrace the rule enunciated in *Powers* and conclude that it is appropriate to treat a trust or will, drafted in clear violation of the MRPC, differently than a contract drafted in violation of the MRPC would be treated. In the case of a contract deemed void as against public policy because it violates the MRPC, it is principally the drafting lawyer who suffers the consequence of the invalid contract. However, where a trust or will is deemed void as against public policy because the drafting attorney violated the MRPC, the invalidation of the bequest potentially fails to honor the actual and sincere desires of the grantor. [Ex 18, Opinion, pp 6-7].

The obligation to honor a testator's intent when considering estate document drastically changes the public policy landscape from simple contract interpretation. Where, as here, there is no evidence of undue influence, the testator's intention to benefit the attorney-scrivener must be recognized and upheld.[67] Otherwise, refusing to enforce a will

[67] Obviously, in cases where there is evidence of undue influence by the attorney-scrivener, the testator's intent may be unclear, and accordingly this factor may have less significance.

that reflects the testator's intent would grant a windfall either to persons whom the testator did not intend to benefit or to the State by escheat. (In the instant case, it would actually cause a windfall that the decedent specifically intended to prohibit.)

Finally, where a dispute requires the Court to weigh and balance conflicting public policies, this Court should defer to the state legislature:

> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: "The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's."

Terrien v Zwit, 467 Mich 56, 67; 648 NW2d 602 (2002), quoting *Van v Zahorik,* 460 Mich 320, 327; 597 NW2d 15 (1999).

It is not the task of the judiciary to use public policy to preempt the statutory framework of our State. See *Buzzitta v Larizza Industries, Inc*, 6465 Mich 975; 641 NW2d 593 (Mich 2002) Mem (Corrigan, Concurrence) ("This Court lacks authority to rewrite statutes to conform to our view of sound public policy. Indeed, we must apply statutory text ***e****ven where we view the result as "absurd" or "unjust.*") See also *Robertson v Daimlerchrysler Corp*, 465 Mich 732, 758; 641 NW2d 567 (2002) ("constitutional duty" of Michigan Courts "***not*** to substitute our own policy preferences in order to make the law less 'illogical'") (emphasis in original); *Terrien v Zwit*, 467 Mich 56, 66 n 9; 648 NW2d 602 (2002) ("The principle that contracts in contravention of public policy are not enforceable should be *applied with caution*.") It would be inappropriate to overrule *Powers* based on the public policy set forth in Rule 1.8(c).

3. The Appellants' Argument That The MRPC's "Shall Not" Provision Authorizes A Trial Judge To Invalidate Estate Documents Goes Too Far

The Appellants argue that the MRPCs "shall not" language necessarily means that courts are authorized to enforce the prohibition. Not so. The MRPCs actually enumerate 54 different things that attorneys "shall not" do.[68] If the Appellants' argument that the public policy supporting Rule 1.8(c)'s "shall not" prohibitions authorized judges to punish counsel appearing before them for unethical behavior, then courts could also make summary determinations about the other 53 MRPC prohibitions. See e g, Rule 1.1 ("lawyer *shall not* handle a legal matter without preparation adequate in the circumstances"); Rule 3.3(a)(1) ("lawyer *shall not* knowingly make a false statement of material fact or law to a tribunal"); Rule 3.4(d) ("lawyer *shall not* in pretrial procedure, make a frivolous discovery request"); Rule 3.5(d) ("lawyer *shall not* engage in undignified or discourteous conduct toward the tribunal"); Rule 4.4: ("lawyer *shall not* use means that have no substantial purpose other than to embarrass, delay, or burden a third person [in representing a client]").

Appellants' argument, therefore, would authorize Michigan's trial courts to summarily enforce all MRPC prohibitions – for example, dismissing a lawsuit because of a frivolous discovery request -- a result that would necessarily be made without the procedural safeguards established by this Court in MCR 9.101 et seq. Such a result would

[68] See MRPC 1.1; 1.2(c); 1.5(a); 1.5(d); 1.6(b); 1.7(a); 1.7(b); 1.8(a); 1.8(c); 1.8(d); 1.8(e); 1.8(f); 1.8(g); 1.8(h); 1.8(i); 1.8(j); 1.9(a); 1.9(b); 1.9(c); 1.10(a); 1.11(a); 1.11(c); 1.12(a); 1.12(b); 1.16(a); 2.2(c); 3.1; 3.3(a); 3.4; 3.5; 3.6(a); 3.7(a); 3.8(c); 4.1; 4.2; 4.3; 4.4; 5.4(a); 5.4(b); 5.4(c); 5.4(d); 5.5(a); 5.5(b); 5.6; 6.2; 6.3(a); 7.2(c); 7.3(a); 7.3(b); 7.5(a); 7.5(c); 8.1(a); 8.2(a).

be an enforcement nightmare, and would invite challenges from disciplined attorneys complaining that their "discipline" was disproportionate to that received by other attorneys for similar conduct.[69]

C. The Appellants' "Rulemaking Power" Argument Is Not Based on a Change in Michigan Law

The Appellants also invite this Court to overrule *Powers* by arguing that the scope of the Supreme Court's rulemaking power in the area of attorney discipline is unclear. No clarification is necessary. MCL §600.904, as enacted by Michigan's legislature plainly provides that:

> The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar. [See also Const. 1963, art 6 § 5].

This Court's power to regulate lawyers is not new to Michigan jurisprudence. See *Schlossberg v State Bar Grievance Bd,* 388 Mich 389, 395; 200 NW2d 219 (1972) ("[a]s

[69] Cases in other jurisdictions reveal that there is a broad spectrum of circumstances in which an attorney may violate Rule 1.8(c), and that the same discipline is not appropriate in each situation. Compare, eg *Attorney Grievance Comm'n of Maryland v Lanocha,* 392 Md 234, 246; 896 A2d 996 (2006) (where attorney drafted will in violation of Rule 1.8(c) leaving substantial bequest to his adult daughter, and where there was no evidence of duress or improper influence, appropriate disciplinary sanction for scrivener attorney was reprimand) with *In re Disciplinary Proceeding Against Miller*, 149 Wash 2d 262, 288; 66 P3d 1069 (2003) (where attorney befriended elderly female client, added his name to her large CD, falsified a loan application based on the CD, cashed the CD, told his legal assistant to prepare a will for the client leaving the lawyer a substantial gift, filed probate proceedings less than 12 hours after client's death, and immediately upon receiving letters testamentary transferred money in her bank accounts to his own name, disbarment was appropriate).

early as 1850, this Court recognized and exercised its power to regulate members of our state bar").[70]

What the Appellants actually seek here is for this Court to overrule *Powers* and establish a procedure to bypass the entire attorney-disciplinary system and to preempt other laws that are inconsistent with the result Appellants seek, in the event that a trial or probate court concludes that an attorney-litigant violated the MRPCs. Such a result would exceed the recognized limits of this Court's authority. See *People v Glass*, 464 Mich 266, 281; 627 NW2d 261 (2001), quoting *McDougall v Schanz,* 461 Mich 15, 26; 597 NW2d 148 (1999) ("[T]his Court's constitutional rulemaking authority extends only to matters of practice and procedure: *[t]his Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law*.")

If this Court desires to change the MRPCs, it should do so in the normal manner by which it amends these rules. But it should not use a case pending before it to modify or change the provisions of the MRPCs or the way in which they are applied.

CONCLUSION AND RELIEF REQUESTED

This Court should not overrule *In re Powers,* 375 Mich 150; 134 NW2d 148 (1965). *Powers* appropriately recognized the importance of upholding a testator's intent and that a will and trust are not necessarily rendered invalid because they were drafted by an attorney

[70] Pursuant to this statute (and the State constitution) this Court has promulgated rules governing the discipline of Michigan attorneys, including both a prosecution arm (the Attorney Grievance Commission) MCR 9.108, and an adjudicative arm (the Attorney Discipline Board). MCR 9.110. "A proceeding under [MCR] subchapter 9.100 is subject to the superintending control of the Supreme Court" MCR 9.107(A), and such matters are subject to review by this Court. MCR 9.122(A).

in violation of the attorney's ethical obligations. It reaffirmed the well-established rebuttable presumption of undue influence by a fiduciary and it declined to usurp the legislature's role by promulgating new standards for the validity of estate documents.

Overruling *Powers* would do violence to the uniformity, predictability and consistency essential in the probate arena. There has been no change in Michigan law since 1965 that necessitates overruling *Powers*—the MRPCs do not address the validity of documents drafted in violation of the rules and nothing in them supports creation of a new exception to EPIC.

Overruling *Powers* would create many more difficulties than it would solve. For example, the Appellants' suggested approach would: (1) ignore the testator's intent; (2) usurp the role of state legislators in modifying EPIC; (3) create new and unanticipated holes in EPIC; (4) create a *de facto* bypass of the attorney disciplinary system with no due process guarantees; and (5) encourage litigants to assert ethical improprieties by opposing counsel for strategic advantage.

This Court should decline the Appellants' invitation to judicially create a new bright line rule barring an attorney-scrivener from receiving a gift from a non-family member decedent. A change to the application of EPIC should be made, if at all, by the Michigan legislature, not by this Court. Michigan's legislators, not its judges, are the appropriate individuals to consider any such modifications to EPIC. This Court should decline to overrule *Powers*.

Petitioner-Appellee Mr. Papazian does not believe that leave should be granted in this case. In the event that the Court is inclined to grant leave, Petitioner-Appellee Mr.

Papazian asks the Court to first consider the multi-faceted aspects of this case on full briefs, and then to reiterate and uphold the principles set forth in *Powers*. Mr. Papazian further respectfully suggests that, in light of the complexity of the issues in this case, there is no basis for peremptory reversal.

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